[Glacy] why. He told me that Mr. McGinnis wanted it handled in that manner." (R. 99)..

"Mr. Griffin: (For McGinnis) I move to strike out that answer as not binding on my client.

The Court: No, it is not binding to your client, but it is admissible in evidence as against Mr. Glacy. I can't strike it out.

Mr. Griffin: Would your Honor instruct the jury?

The Court: I could, but I won't at this time. I will at the right time." (R. 99).

The trial was suspended from October 8 to October 13.

On the latter date, Bolton resumed his testimony under direct examination by the attorney general. The following then occurred (R. 109-112):

"Q. And you testified that in this same conversation Mr. Glacy told you that Mr. McGinnis—

Mr. Griffin: I object to the repetition of this.

The Court: I think after four days' interruption, he is just bringing the witness up to the point where he wants to proceed.

Mr. Griffin: But I want to object to this statement as binding on Mr. McGinnis.

The Court: It is not binding on Mr. McGinnis and not received—

Mr. Dougherty: May I ask the question, and then approach the bench, your Honor?

The Court: Yes.

* * *

Q. Did you testify that in that same conversation Mr. Glacy told you that Mr. McGinnis had given an instruction that the ten coaches were to be sold by

Mr. Mersey's International Railway Equipment Corporation?

Mr. Griffin: Just a minute. I object to the form of that question, because that is not what the statement was at all.

The Court: I will let the witness answer as to that.

Q. Is that correct, sir? A. That is correct.

* * *

(Conference at the bench at which the following was recorded:

Mr. Dougherty: Your Honor, the government has felt that that statement by Mr. Glacy is admissible against Mr. McGinnis on the principle of agency, on the principle that it goes to the res gestae, on the principle that it is an admission, and on the principle that it constitutes a mere instruction. And we would like permission to submit to your Honor a brief on that point.

The Court: I will allow it de bene subject to what you have to say.

Mr. Griffin: I have to say that it is the merest hearsay.

The Court: It is merely hearsay, but—

Mr. Griffin: And incidentally highly prejudicial. In the light of this case, and the charges and the testimony, you couldn't have a statement more prejudicial to Mr. McGinnis.

Mr. Dougherty: Most admissions are prejudicial.

The Court: It is subject to your motion to strike later.

Mr. Griffin: And incidentally, I want to call your attention to the fact that in asking the question this morning the government has para-

phrased the answer in a different fashion. That wasn't it at all.

The Court: It is a question of fact. I can't decide that; that is for the jury.

Mr. Griffin: The testimony of Mr. Bolton as given was that Mr. McGinnis said he wanted it that way, and now he has put different words into the witness's mouth, that Mr. McGinnis instructed.

The Court: All right.

• • •

The Court: (To the jury): The Court has ruled now that this statement of Glacy is admissible as to Glacy as to what Glacy said. The Court does not say, . . : that it establishes the truth of the fact that Mr. McGinnis may or may not have said something or issued instructions or not.

It may be offered as against Glacy fully as something Glacy said. It is now received conditionally against McGinnis subject to further ruling of the Court.

Mr. Griffin: Note my exception to that, your Honor?

The Court: Yes."

Mr. Bolton was asked only four questions on cross-examination by counsel for McGinnis. He agreed that he had never had any direct communication with McGinnis concerning the sale of the ten coaches. Nor had he had any conversation on this subject with anyone in the presence of McGinnis. (R. 115-116).

B. Bugbee.

The government called Waldo L. Bugbee as a witness. While he was testifying on direct examination he was asked

about a conversation with Mersey in which there was reference to a talk between Mersey and McGinnis. On objection by counsel for McGinnis, the Court admitted the question as to Mersey and International. Bugbee then testified that Mersey had indicated that McGinnis had told the president of the Wabash that it should not be dealing directly with the B & M. (R. 199). Mersey also indicated that McGinnis had questioned him about having the sale of the cars in hand or could he manage them.

At this point, the Court ruled that the conversation was not being admitted against McGinnis, and the jury was so instructed (R. 200-201).

Mr. Bugbee's memory was often refreshed by reference to a document shown to him by counsel for the government.

He agreed that he did not know McGinnis and had never had any communication with him. (R. 204). After looking at a document, shown to him by counsel for McGinnis, Bugbee testified that what McGinnis was supposed to have said to the President of the Wabash was, "Why don't you come to me direct, you know we are getting rid of the passenger service, come to me direct and you can save some money." (R. 207-8).

At this point in the trial, counsel for McGinnis asked the Court if it would entertain motions to strike. The Court replied:

> "We will come to that when we come to it. I don't know how your cases are going to be tried, and if this develops into a joint venture it is a joint venture. If it does not develop into a joint venture, then it is individual." (R. 209).

On redirect examination, Bugbee was asked if he had a telephone recording device in May and June of 1958. (R. 246). On objection by counsel for McGinnis there was a

bench conference. (R. 247-249). At its conclusion, the Court ruled that it would permit the government to admit evidence of the recording device to show that a portion of cross examination was taken out of context but that it was not to be binding on McGinnis.

Bugbee continued to explain that his device recorded certain telephone conversations which would then be transcribed by his secretary and the transcripts were then filed. (R. 252).

Over objections of counsel for McGinnis, transcripts of conversations between Mersey and Bugbee, dated May 14 and June 25, 1958, were admitted against Mersey and International as records kept in the usual course of business (R. 253-4). (Exhs. 80 and 81, R. 825 and 829).

C. Bullis.

Maynard W. Bullis, clerk of the B & M, prepares the agenda for directors' meetings from suggestions submitted by the various departments. These are sent to the President for review. The president never changed an item. (R. 314). Item 5 on the agenda for July 23, 1958, refers to the sale of the ten cars. It was received from the operating department and was sent to McGinnis for approval. (R. 317).

At this point, on the opening of the 7th day of trial, the Court indicated, *sua sponte,* that it was inclined to rule that all evidence was admissible against all defendants. (R. 319).

Bullis resumed that McGinnis voted for the sale of the ten cars.

D. The Exhibits.

In the course of the trial numerous exhibits were admitted against other defendants, but not against McGinnis.

Most of the exhibits bore no mention of or reference to McGinnis. Many of those in which he is mentioned or of which he received a copy had no reference to the ten cars.

However, all the exhibits were ultimately admitted as against McGinnis.

E. The Ruling of the Court on Evidence.

The trial court ruled and charged that all the evidence that had been adduced could be considered against McGinnis. This was attacked by his counsel by way of objection, argument, a motion for a mistrial (R. 351), a motion to strike (R. 730), and requests for instructions to the jury.

## Argument

I. The Trial Court Erred In Denying McGinnis' Motion To Dismiss the Indictment.

McGinnis' motion to dismiss the indictment as to Count Two was based on the following grounds, *inter alia*:

> (a) It "fails to allege facts which constitute a criminal offense against the United States." (Paragraph 11, R. 22).
>
> (b) It "is vague and uncertain, and fails to be or to contain a plain, concise and definite written statement of the essential facts constituting the offense or offenses sought to be charged." (Paragraph 14, R. 23).
>
> (c) It "states two inconsistent conclusions in paragraph 11 thereof." (Paragraph 15, R. 23).
>
> (d) It "does not adequately and fairly inform the defendant, Patrick B. McGinnis, of the offense or of-

fenses sought to be charged against him." (Paragraph 16, R. 23).

The vagueness and uncertainly of the indictment, and the inconsistency of the allegations of paragraph 11 thereof, are fully discussed in Point III at page 18 of the Benson petition. We adopt the argument advanced therein.

The Motion to Dismiss Count Two should have been allowed.

II. The Trial Court Erred In Admitting As Against McGinnis All the Evidence Originally Offered and Received Only As To Other Defendants.

At the close of the government's case, the trial court admitted as against all defendants all evidence which had been previously received against any defendant. In effect, this action constituted a determination that a *prima facie* showing of conspiracy had been made.

*United States* v. *Dennis,* 183 F.2d 201 (2nd Cir. 1950);
*Carbo* v. *United States,* 314 F.2d 718, 737 (9th Cir. 1963).

Evidence of the acts and declarations of other defendants could not be admitted against McGinnis unless (a) the existence of a conspiracy had been established and (b) McGinnis' participation in the conspiracy had been established.

*Harney* v. *United States,* 306 F.2d 523, 533 (1st Cir. 1962);
*May* v. *United States,* 175 F.2d 994, 1008 (D.C. Cir. 1949).

There was insufficient evidence to establish the participation of McGinnis in any conspiracy that existed. Such participation must be established by independent evidence.

*Glasser* v. *United States*, 315 U.S. 60, 74.

Put another way, McGinnis' connection with the alleged conspiracy cannot be established by the acts or declarations of other defendants in his absence. His participation should be shown by his own acts and declarations.

*May* v. *United States, supra*, at 175 F.2d 1007-1008.

The Court of Appeals appears to have been persuaded by this argument of the petitioner. In summarizing the evidence clearly admissible against McGinnis, the opinion makes no mention of the hearsay testimony of Bolton and Bugbee concerning statements of Glacy and Mersey respectively. Instead, the Circuit Court rests entirely on:

(a) The fact that the agenda did not follow "standard practice";

(b) That McGinnis, by a process of elimination, must have "sponsored" the sale of the ten cars (p. 7a *infra*);

(c) That McGinnis received money from International p. 8a *infra*); and

(d) That McGinnis presented the matter to the board in "a significantly unorthodox manner" (p. 9a *infra*).

Except for the payments, about which there was no dispute, the record is barren of any evidence to support these remarkable statements of the Court of Appeals. It is equally empty of the equally remarkable conclusion that there was clear evidence that McGinnis "conspired with Mersey" (p. 9a *infra*).

Petitioner called these matters to the attention of the Court of Appeals in his attempt to obtain a rehearing (pp. 14a-17a *infra*).

Even if McGinnis did see and approve item 5, this does not tend to show his connection with the alleged conspiracy. International was not mentioned in the agenda. His review of item 5, along with the rest of the agenda, was an ordinary part of his duties as President. No conclusion can be drawn from the fact that he approved the agenda, including item 5, since Bullis testified that McGinnis never had changed an item on an agenda, except to have it rewritten for clarification (R. 314). His "approval" was concerned with form rather than substance.

The testimony of Connor, that McGinnis stated that "he presented the matter to his board of directors on July 23, 1958" (R. 647), is entirely consistent with McGinnis' non-participation in the alleged conspiracy. The statement is, at most, ambiguous. One cannot infer from it that McGinnis urged the other directors to vote for that item. In fact, the undisputed testimony of Bullis, the government's witness, was that he could not recall any discussion of item 5 (R. 323).

Likewise, McGinnis' vote to approve the sale of the cars is not an unusual action which would indicate that he was a conspirator, especially in view of the fact that the vote was unanimous (R. 323).

There was no evidence of any meetings, correspondence, or conversations between McGinnis and any of the other alleged conspirators where the subject matter was probably discussed. This distinguishes the case at bar from those cases in which, although there was no direct evidence of a conspiracy, there was evidence of meetings from which a common plan could be inferred.

See *Harney* v. *United States, supra,* at 306 F.2d 530.

We rely heavily upon the decision in *Reiss* v. *United States,* 324 F.2d 680 (1st Cir. 1963), which reversed the conspiracy conviction of one Dole, on the grounds of insufficient evidence. There, the Court stated, at page 685:

> "With respect to [Dole] the government does no more than list a number of presumptively innocent actions. Unless such actions are in some way related so that they reflect upon each other, an accumulation of nothings is still nothing. Conspiracy cannot be established by mere inferences no more valid than others equally supported by reason and experience."

In the case at bar the independent evidence against McGinnis is likewise "no more than a number of presumptively innocent actions." There was no evidence that McGinnis was under a duty to scrutinize carefully the details of item 5 of the agenda. Nor was there anything in item 5 itself to suggest any wrongdoing. There was no evidence that McGinnis' actions at the directors' meeting were unusual or improper. The payment of $35,000 does not, in and of itself, appear improper, and there is no evidence that it was in any way connected with McGinnis' actions with regard to the sale of the cars. There was no independent evidence that McGinnis even knew that International was the prospective purchaser of the cars.

Even assuming, *arguendo,* that the evidence warranted a finding that (1) McGinnis and Mersey conspired to misapply B & M assets, and (2) either Glacy or Benson or both also conspired with Mersey, the Court would still not be justified in admitted the acts and statements of Glacy and Benson on the question of McGinnis' guilt. In support of this contention, we adopt and incorporate by reference the discussion of this in Point I at page 11 of the Benson petition.

## III. The Trial Court Erred In Admitting Certain Specific Evidence As To McGinnis.

### A. Documentary Evidence Originally Received Only Against Other Defendants.

Almost at the outset of the trial, the Trial Judge stated to the jury that certain documents would be offered and received only against certain defendants, and would not be evidence against the other defendants (R. 50-51). The overwhelming majority of the documentary exhibits were not originally offered or received against McGinnis. These documents were voluminous, numerous and bulky. They included checks, correspondence, memoranda, records, and ledgers.

Later, these documents were admitted en masse against McGinnis.

### B. The Hearsay Testimony of Bolton and Bugbee

The details of the testimony of Bolton and Bugbee are set forth in the statement of the case, *supra*, at pages 5 to 10.

Bolton's testimony, and the transcripts of Bugbee's phone converstaions with Mersey (Ex. 80 and 81, R. 825-830) were included in McGinnis' Motion to Strike (R. 730). McGinnis' counsel also moved for a mistrial on the ground that the admission of these statements was unjustified (R. 351).

It is submitted that the admission of these declarations against McGinnis was highly prejudicial error.

We submit further than these conversations are, in effect, irrelevant. The only issue on which they have any bearing is the question of McGinnis' participation in the alleged common plan. Hearsay evidence in the form of declarations

of an alleged co-conspirator may *not* be used to prove the existence of the conspiracy. To do so would be to allow hearsay to "lift itself by its own bootstraps."

*Glasser* v. *United States,* 315 U.S. 60, 75.

In addition, there is the question of the dates of these alleged conversations, in May and June of 1958. Declarations of one co-conspirator prior to the formation of the conspiracy are not admissible against another alleged co-conspirator.

*Christianson* v. *United States,* 226 F.2d 646, 652 (8th Cir. 1955).

The first independent evidence against McGinnis was his actions with respect to the directors' meeting, late in July. The only evidence concerning McGinnis at the time of these declarations were the declarations themselves. And, as pointed out above, the declarations were not competent in in the absence of other, independent evidence concerning McGinnis' participation.

Exhibit 80 and 81 were hearsay on two grounds. First, as transcripts of telephone calls, they only purport to record what was stated in the alleged conversations. Second, Mersey's conversation, as recorded in Exhibit 80 (R. 825), was *itself* a hearsay statement of what McGinnis supposedly said. Thus, that portion of Exhibit 80 which contains Mersey's recount of his conversation with McGinnis is a hearsay record of Mersey's hearsay statement. The trial judge admitted the transcripts into evidence on the ground that they were records kept in the usual course of business (R. 253). We submit that the evidence is insufficient to support the characterization of these transcripts as business records for the purposes of the hearsay rule. But even if this contention is wrong, only *one* of

the two aspects of our objection would be removed. Mersey's statements, even if embodied in business records, were still hearsay, and should have been excluded.

There were numerous other objections to the admission of inadmissible testimony. (See e.g. R. 89-94; R. 186; R. 194 and 258; R. 279; and R. 296).

Many of these ruling constitute reversible error standing by themselves. Their cumulative effect was extremely damaging to the defense of McGinnis.

## IV. The Payments Received By McGinnis From International Were Not Assets of the B & M Within the Meaning of the Statute.

Although the question has not yet been settled by this Court, we submit that the receipt of so-called kickbacks should not be held to be violative of 18 U.S.C. § 660. The decision of the Court of Appeals is irreconcilable with the reasoning in decisions under the banking statute, now 18 U.S.C. § 656, from which § 660 was derived.

This point is fully discussed in Point II at page 16 of the Benson petition. We adopt and incorporate by reference the argument advanced therein.

## V. The Trial Court Erred In Refusing Certain of McGinnis' Requests For Instructions.

Several of the requests for instructions which the Trial Court declined to give dealt with the ownership of the moneys paid to McGinnis and the question of a common plan. These requests were made in an attempt to cure, if possible, errors which we submit the Trial Judge had made earlier.

Requests numbered 25 and 26 (R. 739) would have made clear to the jury that they could have believed McGinnis'

testimony without disbelieving that of Bolton and Bugbee. These requests involve reasoning which may not have been apparent to the laymen on the jury. In the absence of these instructions, the jury might have felt that the testimony compelled the conclusion that either McGinnis, on the one hand, or Bolton and Bugbee, on the other, were lying.

VI. Summary

The case at bar presents substantial questions concerning

(a) the interpretation of a federal statute, and
(b) evidentiary standards in conspiracy cases.

Further, the opinion of the Court of Appeals is irreconcilable with the reasoning in earlier decisions in cases in the First Circuit, as well as other circuits, interpreting a statute essentially similar to the statute here in question.

## Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William T. Griffin
Lawrence R. Cohen
*Counsel for Petitioner*

*(Appendices follow)*

Appendix A

# United States Court of Appeals
## For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

*Edward O. Proctor* for George F. Glacy, appellant.

*Claude B. Cross*, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

*Edward F. Myers*, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

*William T. Griffin*, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

*John F. Dougherty*, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

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## OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying [1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000,

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[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another . . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

$25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the

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[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States* v. *Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But will-

broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303

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fulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958 [9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We now recite, under each defendant's name, evidence admissible at least against the stated defendant.

*Mersey*

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal

[9] Unless otherwise noted, all dates refer to 1958.

directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

*Glacy*

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

*Benson*

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

*McGinnis*

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish

the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person . . . ."

We agree with the reasoning of the court in *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States*, 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

*Affirmed.*

## Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
*Clerk.*

Appendix C

# United States Court of Appeals
## For the First Circuit

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,
APPELLEE.

## PETITION FOR REHEARING

Now comes the defendant, appellant, Patrick B. McGinnis, and petitions this Court for a rehearing of the above case, predicated on the judgment and opinion of this Court entered on May 25, 1966. The defendant, appellant assigns the following grounds in support of this petition:

I. In holding that the indictment fully sets out the statutory offense and the basic facts charged, the Court states, at page 3 of the opinion, that it is "unimpressed" by the question of the distinction between misapplying the cars and misapplying the proceeds. The Court goes on to say that the offense charged was the improper sale at a *known inadequate* price to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. It is submitted

that paragraphs 11, 12 and 13, the "charging" portion of the Indictment (R. 18-20), contain no language which can fairly be interpreted as alleging that $250,000 was an inadequate price, or that McGinnis had any reason to suspect that the price was inadequate. The record contains no evidence that the price was inadequate. In fact, the only attempt to establish the fair value of the cars was made by the defendant Benson, and the proffered testimony of his expert witness was excluded on the grounds of insufficent familiarity with the sale of similar cars at or about the same time (R. 552).

At page 4 of the opinion, the Court states that the defendants committed one offense, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, or as pocketing proceeds which, in law, belonged to the railroad. In effect, the Court has ruled that the defendants' argument that the $71,500 could not be found to be B & M property is unavailing, because they could have been found guilty of misapplying the cars, rather than the money.

In so ruling, the Court has rejected the theory under which the government tried the case and upon which it relied in its brief, and has adopted instead a theory which the government has expressly disavowed. At the outset of the trial, in the government's opening, the Attorney General stated that the violation of Section 660 arose from the misapplication and conversion of "the $71,500 which International Railway Equipment Corporation paid to them out of the $425,000 which it got by reselling the cars to the Wabash Railroad, $71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing". (R. 43).

At page 2 of the government's brief, under the heading "Counterstatement of Questions Presented", appears the following:

"2. Where defendant is indicted and convicted for misapplying *the proceeds* from the sale of property of the Boston and Maine Railroad, is a technical finding of legal ownership of such proceeds in the Boston & Maine Railroad essential to such a conviction?" (Emphasis added)

At page 20 of its brief, the government states that "their wrongful act consisted *solely* of what they did with the proceeds after the cars were sold." (Emphasis added).

Any doubts as to the government's theory of the case are dispelled by the following statement at page 19 of its brief:

"That answer is that Paragraphs 12 and 13 of the indictment, as well as the last clause of Paragraph 11, *in fact* apprise defendants that it is the *proceeds* from the sale of the ten cars, and *not* the cars themselves, that constitutes the object of the alleged wrongful misapplication." (Emphasis in original).

By adopting a theory which was expressly rejected by the government, the Court has enabled the defendants' conviction to rest on one point and the affirmance to rest on another. That this is an evil was recognized in *Russell* v. *United States,* 369 U.S. 749, 766 (1962). We submit that justice requires, at the very least, an opportunity for the defendants to present arguments on the sufficiency of the indictment and the evidence to sustain their convictions under the theory which the Court has adopted.

II. In holding that the District Judge was correct in instructing the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants, the Court has ruled that sufficient concert among them was independently shown. It is submitted that in making such ruling, the Court has considered evidence which, as to McGinnis, was not independently admissible, and has made statements of fact

which are contrary to or unsupported by the evidence adduced at the trial.

At page 5 of the opinion, the Court states that the following facts, *inter alia*, were shown by independently admissible evidence:

> "On April 30, 1958, Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29, Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it."

There is nothing in the record to show that McGinnis participated in any of these acts, or was even aware that they were taking place. As to him, this was not independent evidence.

At page 7 of the Opinion, the Court summarizes the evidence independently admissible against McGinnis. The Court first discusses the matter of the agenda for the directors' meeting (Ex. 89). This does not name the buyer, nor did it name the railroad officials who were endorsing the sale, but stated that it was recommended by "management". The Court states that "these lacunae were both contrary to standard practice". This statement is, we submit, wholly unsupported by the record, which contains no testimony whatsoever as to "standard practice" in these matters. The practice followed at directors' meetings was testified to by Maynard W. Bullis, the clerk of the B & M. His testimony, which appears at pages 312 to 318 and 323 to 333 of the record appendix, contains no

reference to the practice with regard to identifying purchasers and proponents in the agenda.

The only evidence which could possibly be construed as indicating a "standard practice" is the agenda for the July 23 meeting, Exhibit 89. Even assuming, *arguendo*, that this agenda for one meeting might be considered evidence of a "standard practice", it does not support the Court's statement.

The agenda is broken down into several schedules, each proposing a specific transaction. Schedules A-1 through A-28 concern proposed real estate transactions. Schedule B concerns Supplemental Indentures. Schedule C concerns a request for refunds from the Old Colony Trust Co. Schedule D concerns the proposed sale of the 10 cars.

With respect to identification of purchasers, it is true that the items in Schedule A identify the proposed grantee of the real estate interest. However, there is a meaningful distinction between the sale of real estate and of chattels. This Court is no doubt aware of the high degree of precision and attention to detail prevalent in the practice of real estate conveyancing. We suggest that the inclusion of the buyer's name in the corporate vote (and thus in the agenda) might well reflect the normal insistence of the purchasers' attorney that the corporate vote authorizing the sale describe the transaction with as much precision as possible. We submit that, absent some evidence of other agenda items relating to the *sale of chattels,* it is unreasonable to assume that such items should contain the purchaser's name as a matter of "standard practice".

With respect to identifying by name the railroad officials who were recommending the sale, the Court's conclusion is directly contradicted by the evidence. Not once in Schedules A-1 through A-28 are the endorsing officials named. Instead, they are referred to as "all interested departments

of the railroad", "the Real Estate Group", "the Industrial Development Department" or "management". That is precisely what was done in Schedule D, the item in question.

The Court then states that McGinnis told an ICC investigator that he had been the one to present the sale to the directors. This testimony, by Connors, the ICC investigator, was presented in rebuttal, after the government and the defendants had rested (R. 647). It could properly be used only to rebut McGinnis testimony, and not to establish a proposition on which the government had the burden of proof. Certainly, it could not have been taken into account by the trial judge in his ruling on the government motion to connect evidence, since that ruling had been made well in advance of Connors' testimony (R. 359).

The Court states that Glacy and Benson were not directors, " and if McGinnis hadn't sponsored the sale it does not appear who did". This statement, which assumes that one of the three alleged conspirators *must* have sponsored the sale, and that, in the absence of contrary evidence, it was McGinnis, disregards the government's obligation to prove its case. In addition, the statement is incorrect, because it *does* appear "who did" present the sale. Bullis testified that the chairman of the board, Mr. Appleton, brought each item before the board, and that he, Bullis, could recall no discussion of this or any other item by any of the directors (R. 318 and 323.)

At page 9 of the Opinion, the Court summarizes the evidence against each defendant on the question of participation in the conspiracy. The Opinion states that "McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner". This statement is wholly unwarranted.

For all of the above reasons, we submit that this Court should grant a rehearing of this case.

Respectfully submitted,

WILLIAM T. GRIFFIN

LAWRENCE R. COHEN
*Attorneys for the defendant, appellant, Patrick B. McGinnis.*

## CERTIFICATE

We, William T. Griffin and Lawrence R. Cohen, counsel for the defendant, appellant, Patrick B. McGinnis, certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

WILLIAM T. GRIFFIN

LAWRENCE R. COHEN
*Attorneys for defendant, appellant, Patrick B. McGinnis.*

## Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,

*v.*

UNITED STATES OF AMERICA,
APPELLEE.

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ORDER OF COURT

June 10, 1966.

It is ordered that the petition for rehearing filed June 8, 1966, be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

## Appendix E

18 U.S.C. § 660. CARRIER'S FUNDS DERIVED FROM COMMERCE; STATE PROSECUTIONS

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. June 25, 1948, c. 645, 62 Stat. 730.